



**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant began working for respondent in May 2008. A pre-employment physical was required. Claimant initially worked in the distribution warehouse and then later moved to the warehouse's shipping and receiving end. His job required claimant to move tires from the final finish area to the stocking locations. Then in March 2011 claimant was transferred to the assembly department. Claimant was required to lift and carry 20-80 pound tire components inside the tire room. But on June 17, 2011, claimant was working overtime performing his old job in the warehouse.

Because of the recent statutory amendments to the workers compensation act it is necessary to address claimant's history of low back complaints. It is undisputed that claimant had episodic treatment for low back complaints before the June 17, 2011 incident at work. The medical records introduced at the preliminary hearing indicate that in approximately August 2006 claimant sought treatment for back pain and was diagnosed with trochanteric bursitis of the left hip. Claimant received an injection into his left hip and recovered immediately after the injection.

The next episode of treatment for back complaints occurred in June 2007 through August 2007 when claimant described back pain with radicular pain down into the left hip. Claimant testified that after conservative treatment including physical therapy he had a near full recovery.

Claimant next sought medical treatment for his back in December 2008 when claimant experienced back pain after lifting his daughter. Again the pain improved until he caught the flu and vomited aggressively which increased his back pain. This episode appears to be the only instance claimant complained of pain down his right leg. And from December 15, 2008, until the incident at work on June 17, 2011, claimant did not have any incidents of back pain with symptoms going down his right leg. Again claimant indicated he had a near full recovery after this episode.

On May 18, 2009, claimant took a commercial driver's license physical and did not have any back problems at that time. In November 2009, claimant had some back pain with symptoms in his left leg which waxed and waned. Dr. Hutchins ordered an MRI which occurred on November 20, 2009. The MRI revealed at L3-4, a mild posterior broad-based disk bulge and a suspected small annular tear within the disk bulge. At L4-5, a left paracentral mild protrusion measuring 4 mm in AP dimensions and bilateral lateral recess stenosis secondary to mild broad-based disk bulge. At L5-S1, there is a mild posterior disk bulge without central canal stenosis or neural foramina stenosis. Dr. Hutchins then referred claimant to see Dr. Louis Pau in January 2010. Dr. Pau prescribed pain patches and also recommended a TENS unit. Claimant tried to use the pain patches at work but

he testified that the pain patches didn't stay adhered to his skin in order to relieve his pain. Again, claimant had a near full recovery from this incident.

The claimant then returned to Dr. Hutchins complaining of left lower back pain in October 2010 and received a trigger point injection in his left lower back. Claimant did not have any permanent limitations or restrictions regarding his low back and did not receive any treatment for his back during the intervening 8 months until after the incident at work on June 17, 2011.

On June 17, 2011, claimant was using a forklift to take tires from stocking locations and load them into a trailer. The trailer is connected to the dock using a hydraulic adjusting lift plate that adjusts the dock height to the trailer's floor height. It is similar to a ramp. Claimant would drive the forklift over the ramp from the dock to the trailer in order to move the tires. Between the dock height and the trailer's floor height could be anywhere from 8 to 10 inches difference. Claimant described the ride and transition:

Both enter and exiting, you will have two different jolt points. One is the beginning of the dock plate. As you are entering in, you have that deviation when you go from flat to the beginning of the ramp or the dock plate. And then you have where the flap goes up that will make the difference between the trailer floor and the dock plate. You will have a jolt at that point, too. So, there's -- so, there's two -- two points where you feel the jolt.<sup>1</sup>

The jolt caused claimant to bounce up and down as well as twist to the side. Claimant was not having any problems with his lower back before the accident. But as the forklift bounced claimant felt immediate pain from his lower back going down to his right ankle.

The pain complaints from his low back down to his right ankle continued throughout the weekend. So on Monday, claimant advised his supervisor, Janeice Brown, about the accident which had occurred on June 17, 2011. Claimant asked to see his own doctor, Joel Hutchins. On June 20, 2011, claimant saw Dr. Hutchins and received a steroid injection. The doctor took him off work. On June 22, 2011, claimant received an epidural but he still continued to have back pain as well as pain radiating down his right leg. Respondent was not able to provide accommodations for claimant's restrictions of no lifting over 5-10 pounds.

On a July 27, 2011 visit at Concentra the report indicates claimant indicated that he did not think his injury was related to his current job but was filing a claim because he thought he had to.<sup>2</sup> But claimant did not recall ever saying that.

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<sup>1</sup> P.H. Trans. at 10.

<sup>2</sup> *Id.*, Resp., Ex. B.

Dr. Hutchins provided claimant additional conservative care and then referred claimant for an MRI and to a neurosurgeon, Dr. Matthew Wills. On August 10, 2011, an MRI was again performed on claimant's lumbar spine. The MRI revealed some dessication and mild bulging of the L3-4 disk, at L4-5 there was mild to moderate posterior osteophytic formation with bulging of the disk and at L5-S1 there was moderate bulging of the disk with protrusion of disk material to the right of the midline encroaching upon the ventral subarachnoid space extending caudally along the right side indenting and displacing the thecal sac in the right passing nerve root.

Claimant was examined and evaluated by Dr. Wills on August 22, 2011. Dr. Wills ordered more physical therapy and indicated that claimant was not a candidate for surgery. Claimant returned to see Dr. Hutchins from August 30th through October 25, 2011. Since October 20, 2011, claimant has either been off work or on restrictions. Dr. Hutchins ordered another epidural which claimant received on November 1, 2011.

At the time of the preliminary hearing, claimant was still having pain from the lower back to the right ankle and stiffness in the right buttock and hamstring. Also, claimant has lost feeling in the groin, genitalia and bowel areas.

Claimant testified:

Q. I want you to tell the Judge what's different as far as what you're experiencing since June 17th as compared to what you experienced before June 17th.

A. The majority that I can recall of everything I had before has always been on the left side -- lower left side. I've never had it be as extreme as what I've had now going down the right side. I've never felt the nerve go down all the way to the ankle like I have or -- or whenever I've had any nerve feeling it was on the left side and only dropped down to the hip where this is the right side and has gone all the way down to the ankle. I have never had any numbness due to any of this pain like I have be-- I've never had numbness like this current issue here. I've never had any -- how do I say this politely? Any erectile dysfunction [sic] prior to the nerve and numbness. I've never had any urination/bowel movement problems prior to --

Q. Are you having those problems now?

A. Yes.

Q. Okay, go ahead.

A. And I've never had any of my prior back trouble take me out of work. I've always been able to work through it before where this is just something that I have not been able to work through.<sup>3</sup>

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<sup>3</sup> P.H. Trans. at 24-25.

Claimant testified that the back and left side pain he experienced before the accident at work would occur for a week or two and then it would go away for months at a time.

At the request of claimant's attorney, on October 11, 2011, claimant was examined and evaluated by Dr. William Hopkins. Dr. Hopkins was provided a history of claimant driving the forklift and receiving jarring to the low back due to the irregularity in the heights between the dock and trailer. Dr. Hopkins specifically noted the results from the MRI performed in November 2009 and the MRI performed August 10, 2011. The doctor opined the MRI performed in 2011 indicated significant changes at L5-S1 which were caused by the incident at work on June 17, 2011. In the report of his examination Dr. Hopkins noted in pertinent part:

Based on the information I have available to me, I believe that the repetitive injuries that Mr. MacIntosh sustained on or about June 17, 2011, are the direct and prevailing factors causing Mr. MacIntosh's injury to his L5-S1 disk and it is also the direct and prevailing factor causing the need for his medical treatment.

In addition, the accident is the prevailing factor causing his current impairment and the cause of his work restrictions that have been outlined by Dr. Hutchins.<sup>4</sup>

The 2011 legislative session resulted in amendments to the workers compensation act. L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

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<sup>4</sup> P.H. Trans., Petitioner's Ex. 2.

(2)(B) An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Initially, the facts establish that claimant suffered an unexpected traumatic event when there were significant jolts when he drove the forklift over the ramp into the trailer on June 17, 2011. Claimant experienced an immediate onset of low back pain that extended down his right side into his right ankle. The MRI performed on August 10, 2011, revealed a herniated disk at L5-S1 encroaching upon the ventral subarachnoid space extending caudally along the right side indenting and displacing the thecal sac in the right passing nerve root. The evidence clearly establishes claimant suffered a work-related accident.

But the amended statutes now require that the accident must be the prevailing factor causing the injury, medical condition and resulting disability or impairment and an accidental injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

The ALJ determined that because of claimant's preexisting low back condition the incident merely rendered his preexisting condition symptomatic. This Board Member disagrees.

It is clear that claimant had sought episodic treatment for low back pain before the work-related incident on June 17, 2011. Such treatment was primarily focused on pain that extended down into his left side and left lower extremity. A comparison of the MRI's performed before and after June 17, 2011, both revealed findings at L3-4, L4-5 and L5-S1. But after the June 17, 2011 accident claimant's pain complaints were on the right and extended down into the right lower extremity to the ankle. And this was corroborated by a new finding on MRI of a herniated disk at L5-S1 which impinged on the nerve. Thus, the accident did not solely aggravate a preexisting condition as claimant did not have a herniated disk at L5-S1 before the June 17, 2011 incident at work.

Turning to the requirement that the accident must be the prevailing factor causing the injury, medical condition and resulting disability, the uncontradicted medical evidence was provided by Dr. Hopkins. And Dr. Hopkins stated the injuries claimant suffered on

June 17, 2011, were the direct and prevailing factors not only causing injury to his L5-S1 disk but were also the direct and prevailing factor causing his need for medical treatment, work restrictions and his current impairment. This Board Member finds claimant has met his burden of proof to establish that he suffered a work-related accidental injury on June 17, 2011, and that such accidental injury is the prevailing factor causing the injury, medical condition and resulting disability.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated November 4, 2011, is reversed and remanded for determination of the remaining issues.

**IT IS SO ORDERED.**

Dated this 31st day of January, 2012.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Mitchell D. Wulfekoetter, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge

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<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2010 Supp. 44-555c(k).